SUPREME COURT, U. S.
DEC 23 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 901

PAUL DE LUCIA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JACK WASSERMAN
DAVID CARLINER
Warner Building
Washington, D. C.
Attorneys for Petitioner

INDEX

OPINION BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 3
STATEMENT OF THE CASE 7
REASONS FOR GRANTING THE WRIT 10
CONCLUSION 14

CITATIONS

CASES:

Bufalino v. Kennedy, 322 F.2d 1016 (D.C. Cir., 1963) 13
Chang v. Immigration and Naturalization Service, 358 F.2d 699 (3rd Cir., 1966) 12
Cheung Lung v. Esperdy, 382 U.S. 891 (No. 430, Oct. Term 1965) 12
Cummings v. Missouri, 4 Wall 329 (1867) 11
Delgadillo v. Carmichael, 332 U.S. 388 (1947) 11
De Lucia v. Flagg, 297 F.2d 58 (7th Cir., 1961), cert. denied, 369 U.S. 837 7
Jordan v. De George, 341 U.S. 223 (1951) 11
Kennedy v. Mendoza-Martinez, 372 U.S. 144, 163 (1962) 11
Lu v. Rogers, 164 F. Supp. 320 (D.C. Dist. of Col., 1958), aff'd, 262 F.2d 471 (D.C. Cir., 1959) 12
Sung v. McGrath, 339 U.S. 33 (1949) 13
Trop v. Dulles, 356 U.S. 86, 99-101 (1957) 10
U. S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1953), 349 U.S. 280 (1955) 13
U. S. ex rel. Cantisanti v. Holton, 248 F.2d 737 (7th Cir., 1957) 13

U. S. ex rel. Circella v. Sahli, 216 F.2d 33, 40 (7th Cir., 1954) 10

U. S. ex rel. Man v. Murff, 264 F.2d 926 (2nd Cir., 1959) 12

U. S. ex rel. Moon v. Shaughnessy, 218 F.2d 316, 318 (2nd Cir., 1954) 18

U. S. ex rel. Paschalidis v. District Director, 134 F. Supp. 310 (S.D. N.Y., 1956) 13

U. S. ex rel. Scala Di Felice v. Shaughnessy, 114 F. Supp. 791 (S.D. N.Y., 1953) 11

United States v. De Lucia, 256 F.2d 487 (7th Cir., 1958), cert. denied, 358 U.S. 836 7

Wolf v. Boyd, 287 F.2d 520 (9th Cir., 1961) 10

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS:

Code of Federal Regulations:
8 CFR 242.8(b), 1965 Supp. 5
8 CFR 242.17(a), 1965 Supp. 5
8 CFR 242.17(c), 1965 Supp. 6
8 CFR 242.17(d), 1965 Supp. 6
8 CFR 242.18(c), 1965 Supp. 6
8 CFR 243.4, 1965 Supp. 6

Immigration and Nationality Act:
8 U.S.C. 1182(h), Sec. 212(h) 5
8 U.S.C. 1253(a), Sec. 243(a) 4
8 U.S.C. 1253(h), Sec. 243(h) 4
8 U.S.C. 1259, Section 249 5

United States Constitution:
Amendment V 3
Amendment VI 4

MISCELLANEOUS:

Exile, Encyclopedia Britannica 11
United Nations Legislative Series, Laws Concerning Nationality (1954), p, 269 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. ___

PAUL DE LUCIA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Paul De Lucia petitions for a writ of certiorari to review a judgment of the Court of Appeals for the Seventh Circuit filed on November 17, 1966, sustaining an order for the petitioner's deportation.

OPINION BELOW

The opinion of the Court of Appeals dated November 17, 1966, is not yet reported and is set forth in Appendix A (R. 727-732).

JURISDICTION

The judgment of the Court below, Appendix B, (R. 733) is dated and was entered on November 17, 1966. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the deportation of a sixty-nine-year-old native of Italy, a diabetic, with a single malfunctioning kidney, suffering from anemia, coronary insufficiency, and hypertension, whose physician has testified without contradiction that deportation and separation of the alien from his resident wife, citizen daughter and two citizen sons (one a mentally ill World War II veteran) would result in injury to his health and/or death — does the deportation of such an alien after forty-six years of residence in the United States constitute a denial of due process and cruel and unusual punishment contrary to the Fifth and Eighth Amendments to the Constitution?

2. Where an alien has designated England as the place of deportation pursuant to 8 U.S.C. 1253(a) and where the uncontradicted evidence establishes that he is stateless and the Board of Immigration Appeals has made no finding as to his present citizenship, may the Immigration and Naturalization Service secure England's refusal to accept him upon the basis of a false representation that he is a citizen of Italy and then proceed to make arrangements for deportation to Italy?

3. After an alien has received notice to be ready on a designated flight (on April 26, 1966) for deportation to Italy, is it premature to raise the propriety of designating Italy as a place of deportation where no evidence is presented as to a valid acceptance of the alien by Italy, (a) in a deportation proceeding, or (b) in the Court of Appeals?

4. Where prior to the deportation hearing herein the Attorney General and the Commissioner of the Immigration Service have, in published reports, referred to an alien as a "racketeer", "czar of the Chicago underworld" and "kingpin of vice" (Ex. A106, A124) and various Attorney Generals over the past ten years have stressed the desirability of giving top priority to the conviction and deportation of those in the so-called racketeer class (Ex. A111-A124), is such an alien entitled to an administrative hearing upon the claim of prejudgment raised by him before the hearing officer (known as a special inquiry officer), a subordinate of the Attorney General? Does such a claim of prejudgment require and present a prima facie case? Is it necessary to claim prejudgment, not only on the part of the hearing officer, but also on the part of the reviewing administrative body, the Board of Immigration Appeals?

5. Whether petitioner was denied a fair hearing upon his request for discretionary relief under 8 U.S.C. 1259 (registry as a permanent resident), and under 8 U.S.C. 1253(h) for a stay of deportation by reason of the denial of compulsory process to him, the denial of the right of cross examination and by reason of the prejudicial publicity created by the Attorney General.

6. Whether the refusal to consider the merits of an application to stay deportation upon medical grounds violated the regulations of the Immigration and Naturalization Service and denied due process to the petitioner.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Amendment V of the United States Constitution provides:

> "No person shall * * * be deprived of life, liberty, or property without due process of law * * *."

Amendment VIII of the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a), 66 Stat. 212, provides in part:

> "The deportation of an alien in the United States provided for in this Act * * * shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory * * *. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon, deportation of such alien shall be directed to any country of which such alien is a subject, national or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months * * * whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without any priority or preference because of their order as herein set forth either —
>
> "(1) to the country from which such alien last entered the United States;
>
> * * *
>
> "(3) to the country in which he was born;
>
> * * *
>
> "(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory."

Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), 66 Stat. 214, as amended on October 3, 1965, 79 Stat. 918, provides:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

Section 249 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1259, 66 Stat. 219, 79 Stat. 920, provides in part:

> "A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, * * * if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under Section 212(a) insofar as it relates to criminals[1] * * * and he establishes that he —
>
> "(a) entered the United States prior to June 30, 1948;
>
> "(b) has had his residence in the United States continuously since such entry;
>
> "(c) is a person of good moral character; and
>
> "(d) is not ineligible to citizenship."

8 C.F.R. 242.8(b), 1965 Supp., provides in part:

> "The special inquiry officer assigned to conduct the hearing shall at any time withdraw if he deems himself disqualified. * * * "

8 C.F.R. 242.17(a), 1965 Supp., provides in part:

> "The respondent may apply to the special inquiry officer * * * for creation of a record of lawful admission for permanent residence under Section 249 of the Act * * * ."

---

[1] The criminal ground of inadmissibility may be waived where the alien has close family ties in the United States. 8 U.S.C. 1182(h). Such waiver application was filed in the instant case.

8 C.F.R. 242.17(c), 1965 Supp., provides in part:

" * * * The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation * * * ."

8 C.F.R. 242.17(d), 1965 Supp., provides in part:

"An application under this section shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability. The respondent shall have the burden of establishing that he is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion."

8 C.F.R. 242.18(c), 1965 Supp., provides in part:

" * * * When deportation is ordered, the special inquiry officer shall specify the country, or countries in the alternate, to which respondent's deportation shall be directed."

8 C.F.R. 243.4, 1965 Supp., provides in part:

"Any request by an alien under a final administrative order of deportation for a stay of deportation, except a request for withholding of deportation pursuant to Section 243(h) of the Act, shall be filed on Form I-246 with the district director having jurisdiction over the place where the alien is at the time of filing. The district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate. * * * "

STATEMENT OF THE CASE

Petitioner is a sixty-nine-year-old native of Italy who is presently stateless. He was born in 1897, came to this country in 1920 and has had over forty-six years' of residence here. He is married to a legal resident of the United States and has three citizen children, one of whom is a mentally ill World War II veteran. Petitioner is a diabetic, with only one malfunctioning kidney. He suffers from anemia, coronary insufficiency and hypertension. He has alleged and uncontradicted medical testimony supports his claim (R. 372 et seq.) that his deportation would endanger his health and life. He has challenged the deportation order herein, administratively (R. 78 et seq.) and in the Court below (App. C) upon the ground that he has been ordered deported after a hearing lacking in due process and fairness, that he has been improperly and illegally directed to report for deportation to Italy, that his proposed deportation would violate constitutional prohibitions and that it would endanger his life and health.

Petitioner was naturalized as a United States citizen in 1928. In 1957 he was denaturalized. *United States v. De Lucia*, 256 F.2d 487 (7th Cir., 1958), cert. denied 358 U.S. 836. Thereafter, in 1959, he was ordered deported as an alien who had entered the United States without proper documents and as one who had committed a crime involving moral turpitude prior to entry. *De Lucia v. Flagg*, 297 F.2d 58 (7th Cir., 1961), cert. denied 369 U.S. 837.

Thereafter, by order of the Board of Immigration Appeals dated September 18, 1964, the deportation hearing of the petitioner was reopened and further hearings conducted culminating in a decision of the Board of Immigration Appeals on April 21, 1966, (R. 1-25) affirming an order of October 25, 1965, by a special inquiry officer (R. 141-197), to deport petitioner to England or upon England's refusal, to deport petitioner to Italy.

During the course of the 1964-1965 deportation hearing before the special inquiry officer, a subordinate of the Attorney General, petitioner moved to disqualify such officer upon a claim of prejudgment. In annual reports published by the Department of Justice in 1957, 1959 and 1962 and in a letter to Senator Eastland in 1960, the Attorney General and the Commissioner of the Immigration Service had publicly described petitioner as a "racketeer", "czar of the Chicago underworld" and "kingpin of vice" (Ex. A106, A124) and various Attorney Generals over the years have stressed the desirability of convicting and deporting such so-called racketeers. (Ex. A111-A124). Petitioner's claim of prejudgment was denied and he was refused an administrative hearing on such issue.

At the deportation hearing petitioner sought to establish the basis for his proposed acceptance by Italy as a deportee and the treatment he would be accorded upon return to Italy (Ex. A60-4 and 5). These motions were denied as not properly brought up in this proceeding (R. 358). Requests to subpoena representatives of the Federal Bureau of Investigation, Narcotics Bureau, Internal Revenue Service, Chicago Police and Public Health Service were initially denied as premature (R. 359-361) and later upon the ground that no essential testimony could be obtained from these witnesses (R. 578). Request for production of the Public Health Surgeon who examined petitioner was likewise denied (Ex. 60-12).

The Trial Attorney subsequently produced an Internal Revenue Agent and the materiality of his testimony showing that petitioner's tax returns had been audited and that no basis had been found for correction is obvious (R. 682, et seq.). The relevancy of testimony by Chicago police officers was likewise admitted by the Trial Attorney who declined to produce them for cross examination (Ex. A-100, Letter of May 27, 1965).

Ex. A134, a communication from the Italian Foreign Ministry, disclaiming discrimination or persecution of

deportees, was introduced herein on the last day of the hearing without affording petitioner the full text of the exchange of correspondence, the right to cross examine or an opportunity to rebut (R. 716-723).

Requests made in the deportation proceedings for the discretionary grant of permanent residence under 8 U.S.C. 1259 and the withholding of deportation upon a claim of physical persecution under 8 U.S.C. 1253(h) were denied.

After the Board's decision affirming the order of deportation and on the same date as the Board's order of April 21, 1966, the District Director of the Immigration Service represented to officials of the United Kingdom, that the petitioner was a citizen of Italy and upon the basis of this false statement, obtained that Government's refusal to accept him as a deportee (App. D., R. 769). Petitioner asserts and it is undisputed on this record that he is presently stateless. He lost his Italian nationality when he was naturalized as an American citizen in 1928. He did not regain such Italian nationality upon his denaturalization (Ex. A102, Attachment 2; Ex. 104 p. 26).

On April 21, 1966, as soon as England's refusal had been obtained the District Director prepared and thereafter served a notice advising petitioner that he was to be deported to Italy on April 26, 1966, on TWA Flight 770 (App. E, R. 768). Petitioner asserts that the direction to deport him to Italy is not supported by adequate findings or evidence that Italy has agreed to accept him (App. C, par. 10). Significantly, on April 27, 1966, the Italian Government revoked travel permission for petitioner and there is presently no authorization for his acceptance by Italy. An application for a stay of deportation upon medical grounds filed on May 4, 1966 (App. F., R. 741-2) was denied upon the ground that current medical information (later supplied on June 8, 1966, R. 737-9) had not been furnished (R. 740).

Petitioner filed a petition to review his deportation order in the Circuit Court of Appeals for the Seventh

Circuit on April 22, 1966, and on November 17, 1966, that Court affirmed the deportation order herein (App. A). The Court rejected the claim that deportation here offends due process or the Eighth Amendment. The claim that deportation was improperly directed to Italy by reason of a refusal obtained from England by misrepresentation was ignored. The assertion that deportation to Italy requires a prior acceptance by that country was found to be premature. It was determined that the claim of prejudgment could not be recognized because it did not present a prima facie case and also because of failure to assert prejudgment against the members of the reviewing Board of Immigration Appeals. Despite the denial of the right to compulsory process and the right to cross examine, the Court below ruled that petitioner had "received a fair opportunity to present his case and has shown no abuse of discretion". The request for a stay of deportation (App. F) denied upon procedural grounds and not on the merits was found to be properly and "fully considered".

REASONS FOR GRANTING THE WRIT

1. The exact limits of the constitutional prohibition against cruel and unusual punishment have not been detailed by this Court. *Trop v. Dulles*, 356 U.S. 86, 99-101 (1957). This petition seeks to have the Court determine for the first time the application of the Eighth Amendment to the deportation of a long time resident of the United States who is in declining health, of advanced age and with close family ties in the United States.

Wolf v. Boyd, 287 F.2d 520 (9th Cir., 1961), acknowledges that a substantial claim may be raised that deportation under circumstances presented here offends the Eighth Amendment. The Court below, however, dismisses the claim in a single sentence, as "without merit", relying upon U.S. ex rel. *Circella v. Sahli*, 216 F.2d 33, 40 (7th Cir., 1954). Whether the deportation of a sixty-nine-

year-old seriously ill stateless alien with forty-six years residence in the United States (twenty-nine as a citizen of the United States) and with close family ties offends the prohibition of the Eighth Amendment against cruel and unusual punishment is a substantial issue, not previously decided by this Court and one which merits its consideration. Exile or banishment has always been considered a form of punishment, from the days of Homer. (Exile, Encyclopedia Britannica). Deportation can be the equivalent of banishment or exile. *Delgadillo v. Carmichael*, 332 U.S. 388 (1947); *Jordan v. De George*, 341 U.S. 223 (1951). Deportation, like expatriation, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163 (1962), may be punishment, and may offend the cruel and unusual punishment prohibition of our Constitution, *Trop v. Dulles*, *supra*. If the Constitution deals with substance and not shadows as was recognized in *Cummings v. Missouri*, 4 Wall 329 (1867), then realistically and consistently with "the evolving standards that mark the progress of a maturing society", *Trop v. Dulles*, *supra*, at 101, the order of exile herein should be evaluated by this Court under the Eighth Amendment.

2. The decision below ignores the mandate of the immigration laws granting an alien the right to select and designate a place of deportation pursuant to 8 U.S.C. 1253(a). Before deportation may be effectuated to another country not designated by the alien, his country of designation must decline to accept him or fail to advise the Attorney General of acceptance within three months. Failure of the Attorney General to supply the country designated by the alien with true, full or complete information deprives him of his rights under the statute and vitiates the subsequent designation by the Attorney General of a place of deportation. U.S. ex rel. *Scala Di Felice v. Shaughnessy*, 114 F. Supp. 791 (S.D.N.Y., 1953). Here, the Immigration Service deliberately misrepresented to England that petitioner was a citizen of Italy, although the Board of Immigration Appeals and the spe-

cial inquiry officer had refused to make any finding as to citizenship (R. 2, 142). Moreover, the record clearly established that petitioner had lost his Italian citizenship in 1928 when he became a naturalized American (Ex. A-102, Attachment 2; Ex. A.104 p. 26) and that he had not regained it upon denaturalization in 1957.[2] The misrepresentation to England precluded deportation to Italy. If there is to be any integrity in the administration of the immigration laws by officials in the Department of Justice, the procedures followed herein should not be allowed to go unnoticed.

3. Although petitioner was scheduled to be deported to Italy on April 26, 1966 (App. E), the Court below found it premature to contest deportability to Italy in the absence of a valid acceptance by that country (App. A). Next to deportability determination of the place of deportation is one of the most important issues in a deportation proceeding. A valid acceptance by a receiving country is a condition precedent to deportation to that country. U.S. ex rel. *Man v. Murff*, 264 F.2d 926 (2d Cir., 1959); *Lu v. Rogers*, 164 F. Supp. 320 (D.C., Dist. of Col. 1958), aff'd. 262 F.2d 471 (D.C. Cir., 1959). Determination of the place of deportation is a matter of administrative adjudication and not an enforcement function as decided below. *Chang v. Immigration and Naturalization Service*, 358 F.2d 699 (3d Cir., 1966). The Solicitor General so advised this Court in *Cheung Lung v. Esperdy*, 382 U.S. 891 (No. 430, Oct. Term, 1965). The decision below is in conflict with the Third Circuit and the views expressed by the Solicitor General on an important and recurring issue presented in deportation proceedings.

4. The instant case alleged and established a case of prejudgment by the Attorney General and the Commissioner of the Immigration and Naturalization Service far

---

[2] Under Italian law petitioner could regain Italian nationality by two years residence in Italy. Article 9(3), Italian Nationality Act of June 13, 1912, United Nations Legislative Series, Laws Concerning Nationality (1954), p. 269.

stronger and of greater substance than that presented or asserted in U.S. ex rel. *Accardi v. Shaughnessy*, 347 U.S. 260 (1953); 349 U.S. 280 (1955). A similar presentation in *Bufalino v. Kennedy*, 322 F.2d 1016 (D.C. Cir., 1963), resulted in a ruling that a prejudgment hearing was required. The ruling below is in conflict with these cases and should be reviewed.[3]

5. In his deportation proceeding, the petitioner was denied compulsory process, the right of confrontation, and the right to cross examine. Nevertheless, the Court below found that the petitioner "received a fair opportunity to present his case" (App. A). Although the petitioner was seeking discretionary relief, he was making such application in a deportation hearing which is required to conform to due process. *Sung v. McGrath*, 339 U.S. 33 (1949). Even with an application for discretionary relief, the alien should be accorded "appropriate procedural due process or fair consideration", U.S. ex rel. *Moon v. Shaughnessy*, 218 F.2d 316, 318 (2d Cir., 1954); U.S. ex rel. *Cantisanti v. Holton*, 248 F.2d 737 (7th Cir., 1957); U.S. ex rel. *Paschalidis v. District Director*, 134 F. Supp. 310 (S.D.N.Y., 1956). Regulations (8 C.F.R. 242.17, 1965 Supp.) having the force and effect of law, U.S. ex rel. *Accardi v. Shaughnessy*, 347 U.S. 260 (1953), authorize applications for discretionary relief in the deportation hearing. They require a fair opportunity to the alien to present evidence and to meet adverse in-

---

[3] The ruling below that a prejudgment claim can only be maintained where prejudgment is asserted against the appellate reviewing Board of Immigration Appeals as well as against the hearing officer is without foundation or precedent. No regulations permit disqualification of the Board. Regulations authorize disqualification of the hearing officer, 8 C.F.R. 242.18(c), 1965 Supp. Evidence is adduced before the hearing officer. No evidentiary hearing is accorded before the Board which sits in a purely appellate capacity, 8 C.F.R. 3.1, 1965 Supp. A prejudgment claim against a trial judge does not necessitate a similar charge against a reviewing court to he effective.

formation. Denying an alien the subpoena power and the right to cross examine are inconsistent with the due process concept of a deportation hearing, with the provisions of the regulations and with the judicial concept that the alien be accorded a fair opportunity to present his case. The ruling below should not be permitted to stand.

6. An application for a stay of deportation upon medical grounds was filed herein on May 4, 1966 (App. F). It did not have attached to it a current medical statement. None was required by regulations as it is the administrative practice to refer the alien to a Public Health Surgeon. Contrary to this practice and despite the fact that petitioner had produced medical testimony in his deportation hearing (R. 372 et seq.), the District Director denied the application, not on its merits, but for failure to submit supporting medical data. This was later supplied on June 8, 1966. The Immigration Service has nevertheless refused to consider the stay application upon its merits. On this state of the record the Court below ruled that the application was "fully considered". We submit that in a case involving such serious consequences as this one, this is neither full nor fair consideration nor proper treatment.

CONCLUSION

Certiorari should be granted and the judgment below should be reviewed.

JACK WASSERMAN
DAVID CARLINER
Warner Building
Washington, D. C.
Attorneys for Petitioner